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Ang Sae Ming v Chow Foong Yien

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HIGH COURT (SHAH ALAM) — JUDICIAL SEPARATION PETITION BA-33–818–12 OF 2017
HAYATUL AKMAL JC
15 NOVEMBER 2018

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Family Law — Divorce — Ancillary relief — Order for interim arrangement with regard to custody, care, control and access to child pending disposal of petition for judicial separation — Whether father should be given structured access to child — Whether proposed access had adverse or detrimental effect on child

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On 1 November 2017, via an originating summons initiated by the respondent wife ('RW'), the parties agreed and had entered into a consent order where both the petitioner husband ('PH') and RW had joint guardianship, joint custody, care and control of their youngest child ('the said child'). Problem arose when RW left the matrimonial home on 30 November 2017 together with the said child and the PH was only allowed periodical access to the said child. The PH then filed petition for judicial separation on 12 December 2017. The matter became worst when the PH was denied access to the said child completely during Chinese New Year celebration period between 25 April 2018 and 8 June 2018. The PH then filed the present application for ancillary relief ('encl 29') to seek an order for interim arrangement with regard to custody, care, control and access to the said child pending the disposal of the petition for judicial separation. Alternatively, the PH prayed for access to their youngest son pending the disposal of the said petition. The RW denied the PH's allegation and had agreed that PH had access to the said child for every weekend from Friday 6pm until Sunday 8pm provided PH had to ensure that the said child would continue with his scheduled weekend activities. In respect of this, the PH prayed that access should be from 5pm on Friday.

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Held, allowing encl 29 in part with no order as to costs:

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(1) The important rule was that except in very exceptional cases it would not be right from the point of view of the child to cut him/her off from all access to either of the parents. In the present case, the court concluded that the PH be given a structured access to the said child to avoid any uncertainty and disagreement. A clearly defined and structured access would better serve the said child and their parents. Whatever activities considered by a parent on the said child should work around the access granted rather than overruling it. This offered clarity and certainty in terms of access and mitigated any further dispute by either party. This

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A certainty would best serve the welfare and interests of the said child which was paramount consideration. It was trite that to restrict access it must be shown to the satisfaction of the court that the proposed visitation or access had an adverse or detrimental effect on the said child which in this case none had been provided (see paras 18–19).

B (2) Since the PH had access for only three weeks in a month, therefore it was reasonable for the court to allow him access on Friday from 5pm until Sunday 8pm. Regarding access during school holidays and during Chinese New Year, it was fair and reasonable for the PH to have access to the said child for the first half of his school holidays and during Chinese C New Year on the third day from 12pm until the end of school holidays for Chinese New Year holidays (see paras 16–17).

[Bahasa Malaysia summary

D Pada 1 November 2017, melalui saman pemula yang dimulakan oleh isteri responden ('RW'), pihak-pihak bersetuju dan telah memasuki satu perintah izin di mana kedua-dua pempetisyen suami ('PH') dan RW mempunyai hak penjagaan bersama, penjagaan, pemeliharaan dan kawalan anak bongsu mereka ('anak tersebut'). Masalah timbul apabila RW meninggalkan rumah E sepencarian pada 30 November 2017 bersama anak tersebut dan PH hanya dibenarkan mendapat akses berkala kepada anak tersebut. PH kemudian memfailkan petisyen untuk pemisahan kehakiman pada 12 Disember 2017. Perkara itu menjadi semakin teruk apabila PH dinafikan akses kepada anak tersebut sepenuhnya semasa sambutan Tahun Baru Cina antara 25 April 2018 F dan 8 Jun 2018. PH kemudiannya memfailkan permohonan ini untuk relif sampingan ('lampiran 29') untuk mendapatkan perintah untuk pengaturan interim berkenaan dengan penjagaan, pemeliharaan, kawalan dan akses kepada anak tersebut sementara menunggu petisyen pemisahan kehakiman selesai. Sebagai alternatif, PH memohon untuk akses kepada anak bongsunya G sementara menunggu petisyen tersebut selesai. RW menafikan tuduhan PH dan bersetuju bahawa PH mempunyai akses kepada anak tersebut setiap hujung minggu dari Jumaat 6 petang hingga Ahad 8 malam dengan syarat PH perlu memastikan bahawa anak tersebut akan meneruskan aktiviti hujung minggu yang dijadualkan. Sehubungan itu, PH memohon bahawa akses harus H daripada pukul 5 petang pada hari Jumaat.

Diputuskan, membenarkan sebahagian daripada lampiran 29 tanpa perintah untuk kos:

I (1) Peraturan yang penting ialah kecuali dalam kes-kes yang sangat luar biasa ia tidak betul dari sudut pandangan anak tersebut untuk memutuskannya dari semua akses kepada salah seorang daripada ibu bapa. Dalam kes ini, mahkamah menyimpulkan bahawa PH diberi akses berstruktur kepada anak tersebut untuk mengelakkan sebarang ketidakpastian dan ketidaksepakatan. Akses yang jelas dan berstruktur

akan lebih membantu kepada anak tersebut dan ibu bapanya. Apa-apa aktiviti yang dipertimbangkan oleh ibu bapa pada anak tersebut harus bergerak di sekitar akses yang diberikan dan bukannya mengatasinya. Ini menawarkan kejelasan dan kepastian dari segi akses dan mengurangkan pertikaian lanjut oleh mana-mana pihak. Kepastian ini akan membantu kebajikan dan kepentingan anak tersebut yang merupakan pertimbangan utama. Adalah tetap bahawa untuk mengehadkan akses itu hendaklah ditunjukkan kepada kepuasan mahkamah bahawa lawatan atau akses yang dicadangkan mempunyai kesan buruk atau memudaratkan pada anak tersebut yang dalam hal ini tidak diberikan (lihat perenggan 18–19).

(2) Memandangkan PH mempunyai akses untuk hanya tiga minggu dalam sebulan, oleh itu adalah munasabah bagi mahkamah untuk membenarkan akses pada hari Jumaat dari 5 petang hingga Ahad 8 malam. Mengenai akses semasa cuti sekolah dan semasa Tahun Baru Cina, adalah adil dan munasabah bagi PH untuk mendapatkan akses kepada anak tersebut untuk separuh pertama cuti sekolahnya dan semasa Tahun Baru Cina pada hari ketiga dari 12 malam hingga akhir cuti sekolah untuk cuti Tahun Baru Cina (lihat perenggan 16–17).]

Notes

For cases on ancillary relief, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4134–4142.

Cases referred to

Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan [2012] 6 MLJ 868; [2013] 1 CLJ 954, HC (refd)
Chan Bee Yen v Yap Chee Kong [1989] 1 MLJ 370, HC (refd)
Ko (an infant), Re [1990] 1 MLJ 494, HC (refd)
Lai Meng v Toh Chew Lian [2012] 8 MLJ 180; [2012] 10 CLJ 479, HC (refd)
Loh Koh Fah v Lee Moy Lan [1976] 2 MLJ 88 (refd)
M v M (child: access) [1973] 2 All ER 81 (refd)
Savinder Kaur v Tharma Singh [1985] 1 MLJ 273; [1984] 1 LNS 129 (refd)
Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; [2000] 2 AMR 2072, HC (refd)
T v T [1966] 2 MLJ 302 (refd)
Yong May Inn v Sia Kuan Seng [1971] 1 MLJ 280 (refd)

Legislation referred to

Guardianship of Infants Act 1961 s 7(3)(a)
Guardianship of Infants Ordinance 1946 (Cap 45) s 5
Guardianship of Infants Ordinance (Cap 93) s 3(2)
Law Reform (Marriage Divorce) Act 1976 s 89

Ong Chin Siong (Siong & Rita) for the petitioner husband.
Yeo Kong Howa (Azam-Malek & Soh) for the respondent wife.

Hayatul Akmal JC:

INTRODUCTION

[1] This is an application for ancillary relief (encl 29) filed by the petitioner husband ('PH') supported by his affidavit (encl 30) against the respondent wife ('RW'), for access to their youngest son pending the disposal of this petition for judicial separation.

[2] The cause papers and written submissions are as follows:

(a) encl (29): PH filed a notice of application for ancillary relief dated 12 June 2018;

(b) encl (30): PH's affidavit in support affirmed by Ang Sae Ming dated 12 June 2018;

(c) encl (31): RW's affidavit in reply affirmed by Chow Foong Yien dated 5 July 2018;

(d) encl (32): PH's affidavit in reply affirmed by Ang Sae Ming dated 18 July 2018; and

(e) encl (36): RW's affidavit in reply affirmed by Chow Foong Yien dated 6 August 2018.

Submissions/reply filed by PH and RW, respectively.

[3] On 18 September 2018, after perusing the cause papers and hearing the submission of counsels, I allowed part of PH's application ie his alternative prayers at para 3(1–3) (encl 29), with no order as to cost. Dissatisfied with the above decision, RW had filed this appeal. In writing this judgment, I will only confine to the alternative prayers and my reasons are as follows:

BRIEF FACTS

[4] PH and RW were legally married on 21 February 1997 and are blessed with three sons, name Ang Hao Wen (now 18+ years old), Ang Hao Ning (15+ years old) and the youngest Ang Hao Zheng (now 5+ years old — 'the said child').

[5] On 1 November 2017, via Originating Summons No BA-24F-148–05 of 2017 initiated by RW, the parties agreed and had entered into a consent

order where both PH and RW have joint guardianship, joint custody, care and control of the said child.

[6] On 12 December 2017, PH filed this petition for judicial separation against RW and on 12 June 2018 proceeded to file an application for ancillary relief (encl 29) supported by his affidavit (encl 30) for an order that PH be given custody, care and control of the said child (with an alternative prayers) and RW be given access set out as follows:

> 2. Responden Isteri diberi akses kepada Anak Bongsu tersebut:
>
> 2.1 setiap hujung minggu dari jam 5pm pada hari Jumaat sehingga jam 8am pada hari Isnin berikutan di setiap hujung minggu kecuali hujung minggu pertama setiap bulan;
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> 2.2 pada setengah bahagian pertama cuti sekolah; dan
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> 2.3 pada sambutan Tahun Baharu Cina dari jam 12pm pada hari ketiga Tahun Baharu Cina sehingga cuti sekolah sempena sambutan Tahun Baharu Cina;
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> 3. Secara alternatifnya, Pempetisyen Suami diberi akses ke atas anak bernama Ang Hao Zheng:
>
> 3.1 setiap hujung minggu dari jam 5pm pada hari Jumaat sehingga jam 8am pada hari Isnin berikutan di setiap hujung minggu kecuali hujung minggu pertama setiap bulan;
>
> 3.2 pada setengah bahagian pertama cuti sekolah; dan
>
> 3.3 pada sambutan Tahun Baharu Cina dari jam 12pm pada hari ketiga Tahun Baharu Cina sehingga cuti sekolah sempena sambutan Tahun Baharu Cina.

[7] PH in his affidavit averred that despite the said consent order (dated 1 November 2017), RW left the matrimonial home on 30 November 2017, taking with her the said child and PH was only allowed periodical access to the said child. Eventually later, RW became difficult in giving her consent when during the Chinese New Year celebration period between 25 April 2018 and 8 June 2018, PH was denied access to the said child completely. Due to this, PH decided to file this present application (encl 29) to seek an order for interim arrangement with regard to custody, care, control and access to the said child pending the disposal of this petition. RW denies the allegation of PH and has agreed that PH has access to the said child for every weekend from Friday 6pm until Sunday 8pm provided PH has to ensure that the said child will continue with his scheduled weekend activities.

SUBMISSION BY THE PETITIONER HUSBAND ('PH')

[8] The said child in this case was separated from his father and his two older siblings on 30 November 2017 when RW left the matrimonial home with the

said child. PH further submitted that regardless of the decision of this court on the issue of interim custody, care and control of the said child, an order is necessary to provide for proper access by the parent deprived of custody to the said child in a firm and structured manner. This will avoid the constant disagreement between the parties about the frequency, manner and timing of access to the said child.

[9] In the current situation where RW has de-facto custody of the said child, it is clear that despite allowing PH to have access to the said child, RW can be seen to be less cooperative and less willing to allow PH's request for access for the duration of the same. It is also clear from the affidavits and the letters exhibited by the parties that request and approval for access to the said child have been a tedious affair, having the unnecessary need to involve the lawyers and pray that the order in terms be made of the terms for access in favour of PH.

SUBMISSION OF THE RESPONDENT WIFE ('RW')

[10] RW submitted that she has never denied PH access to the said child and therefore agreed that PH can have access to the said child every week on Friday from 6pm until Sunday 8pm provided PH must make sure that the said child will continue with the activities that was already arranged for him during the weekends.

[11] As for PH's allegation that he was denied access to the said child during Chinese New Year, RW avers that Chinese New Year fall on 16–17 February 2018. Despite having access to the said child on 13–14 February 2018, PH informed RW that he wishes to bring the said child to Alor Setar to spend Chinese New Year. RW disagree because according to RW, PH's parents and his sibling stayed with him at PH's house in Puchong. In other words, there was no necessity for PH to bring the said child back to Alor Setar for Chinese New Year and RW had instead, send the said child to see PH on 19 February 2018.

[12] Since leaving the matrimonial home, RW had enrolled the said child for his weekend educational activities and the fact that PH is always giving her short notice which according to RW is not fair to her and it is not because she denied him access according to her whims and fancies.

THE LAW

[13] Under the guardianship of infants' legislations, the court may make orders relating to the right of access to infants (Guardianship of Infants Act 1961 (Act 351) s 7(3)(a); Sabah Guardianship of Infants Ordinance 1946 (Cap 45) s 5; Sarawak Guardianship of Infants Ordinance (Cap 93) s 3(2) —

see *Halsbury Laws of Malaysia* (Vol 14(1): Family Law, 2013 Reissue) p 117)). The Law Reform (Marriage Divorce) Act 1976 (Act 164) ('the said Act') has more provisions relating to the issue of access. Section 89 of of the said Act provides as follows:

> 89 Orders subject to conditions.
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> (1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.
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> (2) Without prejudice to the generality of subsection (1), an order for custody may —
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> (a) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;
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> (b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
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> (c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;
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> (d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency a s the court may consider reasonable; or
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> (e) prohibit the person given custody from taking the child out of Malaysia.

[14] This section relates to the power of the court in giving access of the child of the marriage to divorcing parents. In determining whether a divorced parent having custody of the child should have access, the paramount consideration is the welfare on the child (see *T v T* [1966] 2 MLJ 302). No court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interest of the child that success should cease, and that was a conclusion at which the court should be extremely slow to arrive. The court in making an order for custody, may impose conditions for the child to visit a parent deprived of custody at such times and for such periods as the court may consider reasonable. Likewise, the court is also empowered to order a deprived parent of custody the rights of access to the child at such times and with such frequency as the court may consider reasonable. In *Savinder Kaur v Tharma Singh* [1985] 1 MLJ 273; [1984] 1 LNS 129 it has been legally determined that the right to access is never denied unless it can be shown that contact with the person granted access is detrimental to the child (see also *Baheerathy a/p*

Arumugam v V Gunaselan a/l V Visvanathan [2012] 6 MLJ 868; [2013] 1 CLJ 954; *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180; [2012] 10 CLJ 479).

[15] It is the court's unfettered discretion when granting access to subject it to duration of visits which ultimately would largely depend upon the facts and circumstances of each particular case. In *Loh Koh Fah v Lee Moy Lan* [1976] 2 MLJ 88 (FC), it was ordered that 'unrestricted right of access' be granted. While in the case of *Re Ko (an infant)* [1990] 1 MLJ 494, a general order of 'reasonable access' was granted. In *Chan Bee Yen v Yap Chee Kong* [1989] 1 MLJ 370, a more specific order of 'daily access for certain hours' was made by the court. In *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 2 AMR 2072, an order may also specify 'the period of access' during the children's school holidays in addition to weekly accesses. In *T v T* Gill J, said that like custody orders, orders for access to infants can be varied if there is change in circumstances. To restrict access, it must be shown to the satisfaction of the court that the visitation granted have a detrimental effect on the infant.

THE FINDINGS OF THIS COURT

[16] From the facts in the present case, on 1 November 2017, the parties have agreed to joint guardianship, joint custody, care and control of the said child and therefore that issue will not be revisited. Back to this present application, regarding access during the weekend, I find RW has agreed that PH has access to the said child on Friday from 6pm until Sunday 8pm provided PH must make sure that the said child will continue with the activities that was already arranged for him during the weekends. Whereas PH prayed that access should be from 5pm on Friday, to my mind since PH has access for only three weeks in a month (except for first week every month) therefore it is reasonable to allow him access on Friday from 5pm until Sunday 8pm. A meaningful and a healthy relationship between both parent and the child must be nurtured and facilitated during the child's nurturing years. The paramount consideration is always the child and not the feuding parents. I hold that in the circumstances of the case the request by PH in this application is not unreasonable and detrimental to the said child. A definite certain and structured visitation rights granted will ensure that there would be no more ambiguity and feud amongst the parties while at the same time arresting and mitigating unilateral action of either party capable of defeating or frustrating the said visitation rights.

[17] Regarding access during school holidays and during Chinese New Year, to my mind it is fair and reasonable that PH has access to the said child for the first half of his school holidays and during Chinese New Year on the third day from 12pm until the end of school holidays for Chinese New Year holidays. In *T v T* Gill J said:

> The general principle is that an order for access to the child will generally be made

at the instance of a parent not having the child's custody unless it is in the child's interests to forbid access and refer to *Stark Stark* [1910] P 190 193 where Cozens-Hardy MR stated the fundamental principle to be as follows:

> We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the other to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen. The court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the court ought, in the language of Lopes LJ (in *Thomasset Thomasset* [1894] P 295) 'to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked.'

[18] The question of access to children whose parents have parted is always a matter which causes the courts a great deal of concern. As was said the court ought not to be inflexible by adhering to hard and fast rule on the issue. The court's power must be exercised discretionally according to facts and circumstances in each case. The important rule is that except in very exceptional cases it would not be right from the point of view of the child to cut him/her off from all access to either of the parents. In the present case I have given the matter very careful thought and consideration and have come to the conclusion that PH be given a structured access to the said child so as to avoid any uncertainty and disagreement. The object of allowing access to the father is to see that the said child grows up knowing and loving his father. In all the circumstances of the case and with a view to avoiding any emotional conflict of loyalties and affection in the mind of the said child, I made an order that the father do have access to the child as prayed above (para 3(1–3)).

[19] It is my considered view that a clearly defined and structured access would better serve the said child and their parents. Whatever activities considered by a parent on the said child should work around the access granted rather than overruling it. This offers clarity and certainty in terms of access and mitigate if not completely negating any further dispute by either party. This certainty I hold, would best serves the welfare and interests of the said child which is of paramount consideration. It is trite that to restrict access it must be shown to the satisfaction of the court that the proposed visitation or access has an adverse or detrimental effect on the said child which in this case none has been provided.

[20] In *Yong May Inn v Sia Kuan Seng* [1971] 1 MLJ 280, it was held that the welfare of a child is not to be measured by money nor physical comfort only. The word welfare must be taken in its widest sense, where every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. Access is to be regarded as a basic right of the child rather than the

basic right of a parent (see *M v M (child: access)* [1973] 2 All ER 81).

CONCLUSION

[21] In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed part of PH application ((para 3(1–3) — encl 29)) with no order as to cost.

Enclosure 29 allowed in part with no order as to costs.

Reported by Dzulqarnain Ab Fatar